IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Date of decision: 18.07.2007

Government (Criminal) Appeal No. 1169 of 2001
(Old No. 2035 of 1989)

A.F.R. (Approved for Reporting)
Not approved for Reporting

(Initial of Judge)

Date: 18.07. 2007

Note: Bench Reader will attach this at the top of first page of the judgment when it is put up before the Judge for signature.

Reserved Judgment

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Government (Criminal) Appeal No. 1169 of 2001
(Old No. 2035 of 1989)

State ….Appellant

Versus

1. Akhtar (Since deceased)
2. Mohd. Umar
3. Nuru, S/o Allahabaksh
4. Rais alias Gabru
5. Ameer Bux, S/o Gareeba
6. Yameen
7. Yaseen (Since deceased)
8. Alla Bux (since deceased)

…..Respondents

Shri Amit Bhatt, learned A.G.A. for the State.
Shri R.P. Nautiyal and Shri B.S. Parihar, learned counsel for respondents.

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble Prafulla C. Pant, J.

Per: Hon'ble Prafulla C. Pant, J.

This appeal, preferred under Section 378 of Code of Criminal Procedure, 1973 (herein after referred as Cr.P.C.) is directed against the judgment and order dated 20.06.1989, passed in Sessions Trial No. 283 of 1987, by the then Sessions Judge,

Indian Penal Code, 1860 (herein after referred as I.P.C.).

2. We heard learned counsel for the parties and perused the entire record of trial court.

3. Prosecution story, in brief, is that on 13.05.1987, at about 10:00 a.m., complainant Jamil Ahmad (P.W. 2) along with his brothers Asgar and Shakil (both deceased), and nephew Mobin (P.W. 3), were ploughing their field, bearing Khasra No. 967, situated in Village Beljuri within the limits of P.S. Kashipur. Their tractor was being driven by driver Radhey Shyam (P.W.4). They were in litigation over possession of said filed with accused/respondent-Alla Bux. On account of this, Alla Bux and his associates were inimical to the complainant (Jamil Ahmad) and his brothers. On aforesaid date and time when the plot was being ploughed, accused/respondents Alla Bux, Akhtar, Mohd Umar, Nuru, Rais alias Gabru, Yamin, Yashin and Amir Bux, armed with deadly weapons-pistol, *tabals* (a sharp edged weapon), knives and lathies, reached in the field. Accused/respondent Alla Bux exhorted his companions where upon all the accused/respondents, started giving blows with the

injured). In the incident, Asgar (another deceased) and Jamil Ahmad (another injured) also received injures of sharp edged weapons. Asgar and Shakil died on the spot. On raising alarm by Jamil Ahmad, persons from near by place reached at the spot where upon accused/respondents ran away towards river *Dhela*. Leaving the dead bodies of Asgar and Shakil on the spot, Jamil Ahmad along with Mobin went to P.S. Kashipur and he got lodged First Information Report. The said report (Ext. A-1) was got scribed by one Anwar Hussain on dictation of Jamil Ahmad (P.W.2). The police registered the crime No. 160 of 1987 against all the eight accused relating to offences punishable under Sections 147, 148, 149, 307 and 302 I.P.C. on 13.05.1987, at about 11:20 a.m. Shri R.S. Lal Sharma (P.W.9), Sub-Inspector, started investigation in the matter. He accompanied with Kalyan Singh (P.W.7), another Sub-Inspector, proceeded towards the spot. The dead bodies were taken by the police into their custody and they prepared inquest reports (Ext. A-5 and Ext. A-10), police form No. 13 (Ext. A-6 and Ext. A-11), sketch of the dead bodies (Ext. A-7 and Ext. A-12) and the letters (Ext. A-8 and Ext. A-14), requesting the Medical Superintendent, for post mortem examination of the dead bodies. Police also

Jamil Ahmad (P.W.2) and Mobin (P.W. 3), were got examined in L.D. Bhatt Civil Hospital, Kashipur, at about 12:00 noon, and their injury reports (Ext. A-21 and Ext. A-22) were prepared by Medical Officer on duty. Post mortem examination on the dead bodies of Asgar and Shakil was conducted on the next day i.e. 14.05.1987, at 10:00 a.m. and 10:30 a.m. respectively by Dr. D.K. Lumba, who prepared the post mortem examination reports (Ext. A-25 and Ext. A-23). During Investigation, the witnesses were interrogated and accused were arrested. From the possession of accused/respondent Akhtar, a pistol, used in the crime, was recovered. Also, empty shells of cartridges, were recovered from the spot itself by the police, which were sent to Ballistic Expert, who gave its report (Ext. A-26) supporting the prosecution. On completion of investigation, the police submitted charge sheet (Ext. A-35) on 30.05.1987 against all the eight accused/respondents, namely Akhtar, Mohd. Umar, Nuru, Rais alias Gabru, Amir Bus, Yamin, Yasin and Alla Bux.

4. The Magistrate, on receipt of the charge sheet, took the cognizance o f the case, and after giving necessary copies to the accused as required under Section 207 Cr.P.C., committed the case to the Court

weapons for commission of murder and voluntarily causing injuries), under Section 302 read with Section 149 I.P.C. (for participating in furtherance of common object of unlawful assembly in commission of murder of Asgar and Shakil), under Section 307 read with Section 149 I.P.C. (for participating in furtherance of common object of unlawful assembly in attempting to commit murder of Mobin) and that of punishable under Section 324 read with Section 149 I.P.C. (for participating in furtherance of common object of unlawful assembly in voluntarily causing hurt to Jamil Ahmad), against accused/respondents Mohd. Umar, Nuru, Rais alias Gabru, Yamin and Yasin. A separate charge was framed against accused/respondent Amir Bux and Alla Bux with regard to the offences punishable under Section 147 I.P.C. (for constituting unlawful assembly with common object,) under Section 302 read with Section 149 I.P.C. (for participating in furtherance of common object in unlawful assembly for commission of murder of Shakil), under Section 307 read with Section 149 I.PC. (for participating in furtherance of common object in unlawful assembly in an attempt to commit murder of Mobin), under Section 302 I.P.C. read with Section 149 (for participating in furtherance to common object in

Jamil Ahmad). A separate charge was framed against accused Akhtar, relating to offences punishable under Section 148 I.P.C. (for being member of unlawful assembly, armed with deadly weapon with others in furtherance of common object to commit murder of Asgar), under Section 302 I.P.C. (for committing murder of Shakil), under Section 307 I.P.C. (for attempting to commit murder of Mobin), Section 324 with Section 149 I.P.C. (for participating in furtherance of common object of unlawful assembly in voluntarily causing hurt with deadly weapon to Jamil Ahmad) and under Section 302 read with Section 149 I.P.C. (for participating in furtherance of common object in unlawful assembly in committing murder of Asgar). All the accused pleaded not guilty and claimed to be tried.

5. Thereafter prosecution got examined P.W.1 Head Constable Arjun Singh, who proved First Information Report (Ext. A-1), P.W. 2 Jamil Ahmad (injured eye witness and the informant), P.W. 3 Mobin (injured eye witness), P.W. 4 Radhey Shyam (driver of tractor- declared hostile), P.W.5 Mohd. Umar (declared hostile), P.W.6 Hamid Ullah (witness of recovery of pistol from Akhtar- declared hostile), P.W. 7 Kalyan Singh, Sub-Inspector

injuries on the person of Jamil Ahmad and Mobin and the one who conducted post mortem examination, were not examined, as the defence counsel admitted the genuineness of the documents prepared by them. The entire prosecution evidence-oral and documentary, was put to the accused under Section 313 of Cr.P.C. in reply to which they alleged the same to be false. The accused (present respondents) alleged that they were falsely implicated on account of enmity due to land dispute. No oral evidence is adduced from the side of the defence but documents Ext. B-1 (copy of judgment and order dated 30.10.1986, passed by Assistant Collector, Kashipur in revenue case No. 22/54 of 1985-86 between the parties), Ext. B-2(copy of statement of one Kaluwa, recorded on 09.10.1986 by the revenue authorities), Ext. B-3 (copy of order dated 30.11.1985, passed by Munsif, Kashipur on application 9-C and 13-C in civil suit No. 206 of 1985 between the parties), Ext. B-4 (copy of order dated 19.05.1986, passed by Additional Civil Judge, Nainital, in civil appeal No. 84 of 1985, between the parties), were filed.

6. The trial court after hearing the parties opined that the charges framed against the

283 of 1987. Aggrieved by said judgment and order, this appeal was preferred by State, before Allahabad High Court on 29.09.1989, the last day of limitation. Leave was granted by said court under Section 378 (3) Cr.P.C. on 21.05.1992 and the appeal was admitted. This Court received the appeal by transfer under Section 35 of U.P. Reorganisation Act, 2000, for its disposal.

7. Before further discussions, it is pertinent to mention here the ante mortem injuries, found on the person of the two deceased and the injuries found on the person of informant and another eye-witness (Mobin). The post mortem examination report-Ext. A-23 (genuineness of which is admitted by the defence), discloses that autopsy was conducted on 14.05.1987, at 10:30 a.m. on dead body of Shakil by Dr. A.K. Lumba. Following ante mortem injuries were recorded in the post mortem report on the dead body of deceased (Shakil):-

1. ***Multiple gin shot wounds of entry in an area of 30 cms X 18 cms on right thigh lower half average size being 0.2 cms to 0.2 cms X skin deep; pellets recovered from thigh muscle; margins inverted***

3. ***Incised wound 2cms X .75cms X bone deep not bridge of nose tapering laterally.***
4. ***Incised wound 3cms X .75cms X cavity deep, 2cms lateral at the level of third rib.***
5. ***Incised wound in post axillary line right side 3cms, below inferior angle of scapula, measuring 2 cms X .5cms X muscle deep.***

In the opinion of the Medical Officer, the margins of all the incised wounds were clean cut and the wounds were tapering laterally. On the internal examination, the Doctor found left parietal bone fractured, membranes as well as brain congested, pleura cut on the left side underneath Injury, left lung cut under the Injury and pericardium as well as heart cut under the injury. He also found chest cavity filled with blood and 4 Ozs of semi digested food in the stomach. In the opinion of the Doctor, who conducted the autopsy, the death of deceased has occurred on account of shock and hemorrhage resulting from ante-mortem injuries.

8. Another post mortem report –Ext. A-25 (genuineness of which is also admitted by defence

1. ***Incised wound 6 cms X 2cms X bone deep, 6 cms above left ear.***
2. ***Incised wound 3cms X 1.5 cms X bone deep, tapering backward towards left 4cms from middle of chin, mandible cut.***
3. ***Incised wound 4 cms X 1cm X chest cavity deep over left side of chest 2cms below nipple tapering laterally.***
4. ***Incised wound 2 cms X .75 cms X cavity deep over left side of chest about 3 cms below injury No. 3.***
5. ***Incised wound 2 cms X 1cm X cavity deep, tapering laterally.***
6. ***Incised wound 3 cms X 1cm X cavity deep about 4 cms lateral to umbilicus over left side tapering laterally.***
7. ***Incised wound 2 cms X .75 cms X cavity deep, 4 cms lateral to umbilicus tapering laterally.***
8. ***Incised wound 2cms X .75 cms X muscle deep over posterior aspect of left upper arm about 10 cms on the elbow tapering below.***
9. ***Incised wound 3cms X 1cm X bone deep over outer aspect of left wrist.***
10. ***Incised wound 6cms X 1cm X bone deep over fore-head just lateral to midline tapering.***

The Medical Officer opined that the margins of all

cut on left side underneath injury; left lung cut underneath the injury; pericardium as well as heart cut under the injury; chest cavity full of blood; small intestines as well as large intestines and gall bladder ruptured and liver cut underneath injures. The Doctor also found 3 Ozs. of semi digested food in the stomach. In the opinion of the Medical Officer, Asgar died on account of shock and hemorrhage due to ante mortem injuries.

9. Injuries of the two eye witnesses, examined on behalf of the prosecution are recorded in Ext. A-21 and Ext. A-22 (genuineness of these documents was also admitted by defence counsel). Ext. A- 21 discloses that on 13.05.1987, at about 12:15 p.m., following Injuries were found on the person of Jamil Ahmad (P.W. 2) at L.D. Bhatt Civil Hospital, Kashipur by the Medical Officer, who examined the injured:-

1. ***Incised wound 11 cms X 3cms X muscle deep on lateral side of right upper arm starting just above the right elbow to middle of upper arm; direction of wound vertically downward; fresh bleeding present.***
2. ***Incised wound 1cm X 1cm X shin deep***

3. ***Incised wound 3cms X 1cm X skin deep on right palm extending vertically downward; fresh bleeding present.***
4. ***Linear abrasion 10 cms long transversely placed around right side and front of neck breadth 0.2 cms situated 1cm below right angle of mandible.***

In the opinion of the Medical Officer, the injuries were fresh and simple in nature, caused by sharp edged weapon.

10. Injury report-Ext. A-22 (genuineness admitted by defence counsel), discloses that P.W. 3 Mobin, was medically examined in aforesaid L.D. Bhatt Civil Hospital, Kashipur on 13.05.1987 at 12:00 hours (noon) by same Medical Officer, who found following injuries on the person of the injured (Mobin):-

1. ***Lacerated wound 4 ½ inches X 1 inch X bone deep on top of scalp, 12 cms above right ear; fresh bleeding present.***
2. ***Contused swelling 2.5 cms X 2.5 cms on back of skull, 4 cms behind the left ear.***
3. ***contusion 4cms X 2cms on back of right forearm, 3 cms above right wrist; colour red.***

average size 0.2 cms X 0.2cms, wounds not probed; no blackening, scorching or tattooing present around wounds.

6. 2 gun shot wounds of entry on right arm, upper one third; one 2 inches above right elbow anterior middle aspect, and 2nd on right palm with average size 0.2cms X 0.2cms X muscle deep; no blackening, scorching or tattooing present around the wounds.

The Doctor kept injuries No. 1,3, 5 and 6 under observation and advised X-ray of skull, chest, right elbow and right fore-arm. The Medical Officer opined that injuries No. 1 to 4, were caused by some hard blunt object and injuries No. 5 and 6 were caused by fire arm. Injuries No. 2 and 4 were simple and all the injuries were fresh at the time of examination.

11. Now we come to the oral evidence adduced by the injured eye-witnesses. P.W.2 Jamil Ahmad (an injured eye witness and informant), states on oath that litigation was going on with accused Alla Bux in a court in respect of a field, situated in Village Beljuri with regard to which, the complainant's side has obtained stay order. Due to this reason, accused started harboring enmity against the family of the

Radhey Shyam. At that point of time, accused Akhtar, Mohd. Umar, Nuru, Rais alias Gabru, Amir, Yamin, Yasin and Allah Bux, reached there. Out of them Akhtar was armed with pistol, Mohd. Umar and Rais were armed with Tabals (sharp edged weapons), Nuru and Yamin, were armed with knives and Alla Bux and Amir, were armed with lathies. P.W. 2 Jamil Ahmad further states that on exhortation of All Bux, Akhtar, fired at Mobin and Shakil. Rest of the accused also stated giving blows thereafter with the weapons they were armed with, at him, Mobin, shakil and Asgar. The witness further narrates that his brothers Shakil and Asgar, died on the spot and he and his nephew Mobin, Suffered injuries. On raising alarm, the witness states that many people reached at the spot and on seeing them coming, the accused ran away towards *Dhela river*. P.W. 2 Jamil Ahmad, has further stated that he got lodged First Information Report at the police station. The statement of this witness regarding lodging of First Information Report, gets corroboration from the statement of P.W. 1 Head Constable Arjun Singh, who has stated that on 13.05.1987, at 11:20 a.m., written report (Ext. A-1) was given by Jamil Ahmad to him on which he made an entry in the general diary, extract of which is Ext. A-2. A check report

12. Statement of P.W. 2 Jamil Ahmad is not only corroborated by the injures found on his person, recorded in Ext. A-21, as mentioned above, and the First Information Report (Ext. A-1), got scribed by him but also from the statement of another injured eye witness- Mobin (P.W. 3). P.W. 3 Mobin also stated on oath before the trial court that he knows all the eight accused. This witness further states that in respect of plot No. 967, situated in Village Beljuri, a litigation was going on between Alla Bux and his father and his brothers. The witness further states that after obtaining stay order from the court, the accused got annoyed with the family of his father. P.W.3 Mobin further states that on 13.05.1987, at about 10:00 a.m. when he along with his father Asgar, Uncle Shakil and Jamil, were getting ploughed the aforesaid field through tractor driven by Radhey Shaym, accused Akhtar, Mohd. Umar, Nuru, Rais alias Gabru, Alla Bux, Amir Bux, Yamin and Yasin, reached there. The witness further states that Akhtar was armed with pistol and Mohd. Umar and Rais were armed with Tabals (sharp edged weapon), Yamin and Nuru, were armed with knives, Yasin was armed with *Kripan* (sharp edged weapon), Alla Bux and Amir Bux, were armed with lathies. The witness narrates that on exhortation of Alla Bux

Armed with. This witness further states that in the incident, his father Asgar and uncle Shakil, died on the spot while he and Jamil Ahmad (P.W. 2), suffered injuries. The witness further narrates that when on raising alarm, people of near by mohalla, started coming towards the spot, seeing this, accused ran away towards *Dhela* river. This witness further corroborates the fact stated by Jamil Ahmad that he gave a written report of the incident to the police. From there, he says both them (he and Jamil Ahmad), were sent for medical examination to the hospital. The injuries recorded in report (Ext. A-22), as quoted above, corroborates that this witness suffered injuries in the incident.

13. Strangely, the trial court has not accepted the testimony of the two injured eye-witnesses even though the statements are natural, trust worthy and supported by medical reports on the record. It is a day light incident. The motive is also established on the record. The reason given by the trial court that the two eye witnesses are highly interested witnesses and related to the deceased is nothing but an excuse to acquit the accused in a double murder case. It is hard to believe that injured witnesses whose close relatives have lost their lives would shield the real

the injures mentioned in the medical reports. From the documents, filed on behalf of the defence itself it is clear that the parties were under litigation and there was clear motive to attack the deceased and the injured on the day of the incident when they were ploughing the disputed field. It is true that P.W. 4 Radhey Shyam, a driver of tractor, an independent eye witness was declared hostile but on close scrutiny, we found that this witness has also supported the prosecution story to the extent that on 13.05.1987, at 10:00 a.m. he was ploughing field of the deceased when some 7-8 persons reached there. This witness states that he got frightened and leaving the tractor, ran away from the place of the occurrence. Even the statement of this independent witness supports the date, time and place of the incident, narrated by the two injured eye witnesses. The part of the prosecution story, what has not been supported by the witness is that he has not named the accused. It is not clear whether driver Radhey Shaym, knew the accused or not. In the circumstances, even his testimony substantially corroborates the prosecution story particularly on the point of date, time and place of the incident.

14. In the similar circumstances in ***Krishan and***

Police and court and corroborated by the medical evidence, cannot be discarded lightly. In ***Surender Singh Vs. State of Haryana (2006) 2 supreme Court Cases (Cri) 444,*** the Apex Court further held that testimony of an injured eye witness has its relevance and efficacy as to the fact that the witness was present during the occurrence and he saw the happening with his own eyes. In ***State of M.P. Vs. Mansingh and others (2007) 2 Supreme Court Cases (Cri) 390,*** the Apex Court has again reiterated that the testimony of injured eye witnesses should not be discarded lightly.

15. Having gone through the record, we are of the view that the trial court has erred in law by disbelieving the prosecution story on the ground that the recovery of pistol from one of the accused, was not found proved, as the independent witnesses of the recovery namely P.W. 6 Hamid Ullah and P.W. 8 Vijay Singh have turned hostile. Prosecution story is supported on that point only by P.W. 9 R.S. Lal Sharma (Investigating Officer). Assuming for a moment that recovery of pistol is not proved beyond reasonable doubt, we are of the view that the testimony of the two injured eye-witnesses, which is consistent and corroborated by the medical evidence,

16. Shri R.P. Nautiyal, learned counsel for the accused/respondents, vehemently argued before us that non examination of the Medical Officers who conducted post mortem examination on the dead bodies and those who found injures on the person of the injured eye witnesses, is fatal for the prosecution. We are unable to accept the argument advanced on behalf of the respondents for the reason that the defence counsel has admitted the genuineness of the injury reports and the post mortem examination reports before the trial court and as such, since genuineness of the documents stand proved, the same can be read in evidence. We think it proper to reproduce sub-section (3) of Section 294 of Cr.P.C., which provides that-

where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceedings under this Code when the proof of signature of the person to whom it purports to be signed.

Provided that the court may, in its discretion, require such signature to be proved.

Learned counsel for the accused/respondents further contended that an accused cannot be compelled to adduce evidence against him. The argument, in our opinion, is misconceived, for the reason that the

denying such document is provided in sub-section (1) of Section 294 Cr.P.C., which provides that where any document is filed before any court by the prosecution, the accused or his pleader, shall be called upon to admit or deny the genuineness of each of such document, Similar is the requirement as to the documents filed on behalf of the accused for securing admission or denial from the prosecution.

17. It is also contended on behalf of the accused/respondent that the trial court has rightly doubted the time of incident, suggested by the prosecution. In this connection, our attention is drawn to the fact that the two deceased in the month of holy Ramjan, were on fasting, as such, there could not have been semi digested food in their stomach at 10:00 a.m. We have gone through the statement of the witness P.W. 2 Jamil Ahmad and found that he has stated that Shakil (deceased) has taken *Sheri* (morning food taken by Muslims before sunrise on a fasting day). Since the incident is of month of May, it can easily be said that after a period of five hours there must have been some semi digested food in the stomach of the deceased, as found by the Doctor, conducting post mortem examination.

Plot No. 267 while the another witness has stated it to be plot No. 967. In our opinion, this is a minor contradiction, which does not create any reasonable doubt in the prosecution story, for what is relevant is not the number of plot but the plot which was being ploughed by the deceased and the witnesses at the time of the incident. With regard to that field (plot No. 967) there is consistent evidence on record that the parties were in litigation before the court of Munsif. Even the documents, filed on behalf of the defence, itself make it clear that it was plot No. 967. Therefore, not much importance can be given to the contradiction pointed out by the learned counsel for the accused/respondents. It is pertinent to mention here that in the First Information Report (Ext. A-1), it is clearly mentioned that the field in which the incident took place was plot No. 967.

19. For the reasons, as discussed above, we are of the view that the approach of the trial court, in appreciating the evidence is totally erroneous in law and against the established principles of criminal jurisprudence. In our opinion, the prosecution has been successful in proving the charge framed against the accused/ respondents. We hold the accused/respondents namely Mohd. Umar, Nuru,

with Section 149 I.P.C. (for participating in furtherance to common object of unlawful assembly in committing murder of Asgar and Shakil), under Section 307 read with Section 149 I.P.C. (for participating in furtherance to common object of unlawful assembly in attempting to commit murder of Mobin), and under Section 324 read with Section 149 I.P.C. (for participating in furtherance to common object of unlawful assembly in voluntarily causing hurt to Jamil Ahmad with deadly weapon).

20. Accordingly the appeal is allowed, Each of the accused/respondents- Mohd. Umar, Nuru, Rais alias Gabru, Amir Bux and Yamin, is convicted under Sections 148 I.P.C., under Section 302 read with Section 149 I.P.C., under Section 307 read with Section 149 I.P.C., under Section 324 read with Section 149 I.P.C., Considering the submissions of the learned counsel for the accused/respondents and that of the appellant, and all the relevant factors having bearing on question of sentence, we sentence each of the said convicts namely, Mohd. Umar, Nuru, Rais alias Gabru, Amir Bux and Yamin, to rigorous imprisonment for a period of one year under Section 148 I.P.C., imprisonment for life under Section 302 read with Section 149 I.P.C., rigorous

sentences awarded shall run concurrently. Registry is directed to sent back the record to the trial court. The trial court shall take the five convicts, named above, into custody and send them to jail to make them serve out the sentences, awarded by this Court. The appeal as against accused/respondents Akhtar, Yasin, Allah Bux, stand abated due to their death during the pendency of this appeal.

(Prafulla C. Pant, J.) **(Rajeev Gupta, C. J.)**

Dt. 18.07.2007

Sweta